Ferguson-Williams, Inc. ***and*** **International Brotherhood of Electrical Workers, Local 278, AFL–CIO.** Cases 16–CA–17123(1–2), 16–CA–17262, and 16–CA–17460

December 11, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND FOX

On April 25, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs, and the General Counsel filed an answering brief in response to the Respondent's exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Ferguson-Williams, Inc., Ingleside, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercing and threatening employees, because of their union activities, with termination, reduced wages, and unspecified adverse effects on their employment.

(b) Coercing employees about their union activities by telling them they were disloyal, should refrain from union activity, hope Respondent would forgive them, and should seek other employment.

(c) Interrogating employees about their union activities and sympathies.

(d) Creating the impression of surveillance of employees' union activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(f) Discharging employees or giving them closer supervision because of their union or other protected concerted activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Billy D. Wilson, Joseph Miller, and Judith Haskin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Billy D. Wilson, Joseph Miller, and Judith Haskin whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Ingleside, Texas facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 16, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not

[1] The General Counsel also filed a motion to strike portions of the Respondent's brief. The motion is denied.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent also has excepted to the judge's finding that employee Billy D. Wilson is not a supervisor under Sec. 2(11) of the Act. The Respondent contends that the judge improperly discredited testimony offered by the Respondent as to Wilson's alleged supervisory authority because the judge wrongly characterized the testimony as prompted by leading questions. Even assuming that the testimony cannot properly be discounted on that ground, however, we find that the record, considered as a whole, fails to establish that Wilson possessed supervisory authority within the meaning of Sec. 2(11) of the Act. The testimony referred to by the Respondent consists essentially of conclusory assertions and is outweighed by credited evidence of what Wilson actually did in his position. See *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) ("conclusory statements made by witnesses in their testimony, without supporting evidence, does not establish supervisory authority"); *Macks Supermarkets*, 288 NLRB 1082, 1084 (1988).

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 23, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate our employees concerning their union sympathies or activities.

WE WILL NOT give our employees the impression that we are surveilling their union activities.

WE WILL NOT threaten or coerce our employees because they engage in union activities.

WE WILL NOT supervise Judith Haskin or any other employee more closely to discourage them from supporting the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Billy D. Wilson, Joseph Miller, and Judith Haskin full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Billy D. Wilson, Joseph Miller, and Judith Haskin whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Billy D. Wilson, Joseph Miller, and Judith Haskin, and WE WILL, within 3 days thereafter, notify each of them, in writing that this has been done and that the discharges will not be used against them in any way.

FERGUSON-WILLIAMS, INC.

Timothy L. Watson, Esq., for the General Counsel.
John C. Falkenberry, Esq. (Sirote & Permutt), of Birmingham, Alabama, for the Respondent.
Mike Carranco, of Corpus Christi, Texas, for the Charging Party.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Corpus Christi, Texas, on November 13–14, 1995, and February 13–16, 1996. The International Brotherhood of Electrical Workers, Local 278, AFL–CIO (the Union) has charged that Ferguson-Williams, Inc. (Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act). The primary issues are whether Respondent committed violations of the Act by coercing employees and by discharging Billy D. Wilson, Joseph Miller, and Judith Haskin.

The Respondent is found to have committed certain violations of Section 8(a)(1) of the Act. Additionally the Respondent is found to have violated Section 8(a)(3) of the Act by the discharges of Billy D. Wilson, Joseph Miller, and the closer supervision and lay off of Judith Haskin. Respondent is not found to have violated Section 8(a)(4) of the Act.

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. BACKGROUND

A. *The Respondent's Business Operations*

The Respondent is a civilian contractor working at the U.S. Navy base in Ingleside, Texas. The Respondent's headquarters is located in Huntsville, Alabama. The Respondent performs various services at the Ingleside Navy base including port operations, maintenance, transportation, and operating a family service center and gym. Respondent's supervisory hierarchy at the Ingleside location is headed by project manager, Sidney Cowan. During the fall of 1994 Henri Fuentes was the deputy project manager and second in command. Terry Collins was the port operations manager.

Mike Ferguson, Randall Ferguson, and Joe Williams are owners, and Don Strawn is vice president and general manager of the Respondent. These men work in the Huntsville home office.

B. *The Union Campaign*

The Respondent's employees at Ingleside are not represented by a union. In September 1994,[1] the Union commenced an organizational campaign at Ingleside. On January 6 the Board conducted a representation election which the Respondent won.

Respondent's former deputy project manager, Henri Fuentes, testified that from the start of the union campaign some employees were telling management about the union activity. Fuentes learned in early October that the Respondent had become concerned by the growing strength of the Union's support. He was instructed by the Huntsville office to find out why the employees wanted union representation. On October 12, Fuentes conducted a supervisors' meeting and got their reports on the subject. Dockmaster Billy D. Wilson and Quality Control Inspector Joe Miller were not included in the supervisors' meeting. Fuentes had a report of the meeting faxed to the home office.

On October 16 some of Respondent's management officials came to Ingleside and met with outside Counsel John Falkenberry to plan a strategy to combat the Union's organizational campaign. Starting the next day a series of departmental meetings were held between management and workers. During one session an employee, Ray Hernandez, asked several questions about wages and pay determination. After the meeting, Fuentes remembered Don Strawn and Mike Ferguson discussing Hernandez. Ferguson said that Hernandez seemed to be a problem and something would have to be done about that.

On October 19 a meeting of salaried employees was held at the base. Strawn and Mike Ferguson stated that Dockmaster Billy D. Wilson and Quality Control Inspector Joe Miller were "white shirts" or salaried employees and they would be considered to be supervisors. Fuentes testified that they had not been considered supervisors prior to this meeting.

II. ALLEGED VIOLATIONS OF SECTION 8(a)(1)

A. *September 21*

Employee Ray Hernandez testified that he attended the first union meeting held on September 20 and signed a union authorization card at that meeting. On September 21 he was in a break area at work. Project Manager Cowan was also there along with about five employees.

Cowan asked Hernandez if he had attended the union meeting the previous night. Hernandez said he had. Cowan asked what was discussed and how many employees attended. Hernandez said that a handful had gone to the meeting. Cowan said, "Sounds like some of [employees] Roger Olds, Fred Null and Jim Chittenden's doings. . . . I believe that was an electrician's union." At this point Hernandez walked away and he heard Cowan asking the other employees if they had attended the union meeting.

In a general denial, Cowan disclaimed ever interrogating employees concerning their union activities. He did admit that he had conversations with employees in the break area where the Union was discussed and questions were asked. Cowan conceded, "We were all trying to find out what was going on."

Hernandez' demeanor and detailed account of this conversation were credible. Hernandez is still employed by the Respondent. This is an additional factor for consideration in assessing credibility of a witness. *NLRB v. Flexsteel Industries*, 83 F.3d 419 (5th Cir. 1996); *Natico, Inc.*, 302 NLRB 668, 689 (1991). Hernandez' credibility contrasts sharply with Cowan's unpersuasive demeanor throughout his testimony. Cowan left the impression of one who was glossing over events. Additionally, Cowan's statement that he along with the employees was "trying to find out what was going on" is a significant admission of his curiosity about union activity. I credit Hernandez' version of the encounter.

In analyzing this incident (as well as the other alleged instances of interrogation discussed below) I have taken into consideration the Fifth Circuit's *Bourne* criteria for evaluating interrogations. *NLRB v. McCollough Environmental Services*, 5 F.3d 923, 928–929 (5th Cir. 1993); *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) There is no significant history of the Respondent's attitude towards its employees; (2) the information sought by the interrogation concerned the employees' private union activities, including the number of employees attending a meeting and what they discussed; (3) the questioner, Cowan, was the highest ranking representative of the Respondent at the worksite; (4) the setting for the interrogation was a gathering of workers in a breakroom. The manner of the interrogation was blunt and uninvited by Hernandez. The manager's question let the employees know that he was aware of their union activities. The questioning was accompanied by the speculation of the interrogating manager that he knew which employees were responsible for the union activity; (5) the employee truthfully answered the inquiries of the manager; (6) there is insufficient evidence that the Respondent had a legitimate purpose in interrogating the employees; (7) there is no evidence a valid purpose for the interrogation was conveyed to the employees; and (8) there were no assurances against reprisals for supporting the Union.

Evaluating all the circumstances of the questioning, I find that the Respondent did violate Section 8(a)(1) of the Act when Cowan interrogated Hernandez and the other employees about their union activities.

B. *September 22*

Hernandez testified that the next day Cowan said he needed to talk to him. They met in Cowan's office where Hernandez recalled Cowan said he had received some "disturbing" phone calls. Cowan said it had been reported to him that Hernandez was pushing the Union on some people. Hernandez denied that he was pushing the Union on anyone.

Cowan continued that he had seen Hernandez the previous day talking to three different people about the Union. Cowan said that if he had known about the phone calls at that time he would have fired Hernandez. Cowan said that Hernandez was jeopardizing his job as long as he campaigned for the Union on his time which was 7 to 3:30. He also stated that if the Union came in it would wipe out the contract the Respondent had with the Navy and wages would go so high the Government would bring in its own employees.

Cowan testified that he had seen Hernandez talking to some other workers. One of them told Cowan that Hernandez

[1] All subsequent dates refer to the period September 1994 to June 1995 unless otherwise specified.

was talking to them about the union. Cowan asked Hernandez into his office and "politely" told him that union activity conversations could not take place during duty hours unless it was at lunch or breaks. This was the only conversation he recalled with Hernandez about the Union.

Hernandez' detailed account of the encounter was credible. His demeanor was that of a witness who was recounting events accurately. Again Cowan's account of what happened was less detailed and by his demeanor is found to be not credible. I find that Cowan did violate Section 8(a)(1) of the Act by saying Hernandez' union activities were being surveilled, threatening the loss of jobs, and by threatening to discharge Hernandez. *Oster Specialty Products*, 315 NLRB 67 (1994).

C. *September 27*

Discharged quality control inspector, Joseph Miller, testified he had a conversation on September 27 in a breakroom area with Cowan and Deputy Project Manager Henri Fuentes. Cowan asked Miller, "You attend that goddamn union meeting last night?" Miller confirmed that he had. Cowan told him, "Well, if you support the union, I will fire your ass."

Cowan then asked Miller and Fuentes to accompany him to his office. Once there Cowan told Miller, "You are management. You don't talk about the union until the union shows up here and involves with us." Miller disputed that he was a management employee. Cowan argued he was considered a management employee because he was salaried.

Cowan stated that if the Union succeeded in its campaign the base could close, the Civil Service could take over the contract, and helpers could start making $6 instead of the $11.62 they were paid. Cowan reiterated that if Miller's name and union came up "in the same conversation" with the Union, or if he mentioned the Union to anyone else on the base, Cowan would fire him.

Fuentes, who at the time of the hearing was no longer employed by the Respondent, also testified that he recalled this meeting. He placed the date in early October. Fuentes recalled Cowan threatening Miller with discharge several times if he heard him mention the Union again or went to a union meeting.

Cowan denied ever threatening to discharge Miller for engaging in union activity. He did recall telling Miller on one occasion that he could not go to union meetings as that might get the Respondent in trouble. Cowan also remembered that Miller had told him at a date "early on" in the union campaign that he had gone to some of the union meetings.

Miller and Fuentes were credible witnesses. Their demeanors were that of witnesses who were impressed with the event and were accurately conveying what they recalled happened. They gave detailed and corroborative versions of Cowan's remarks. Miller and Fuentes are credited as to what Cowan said. In contrast Cowan's demeanor and denial were not convincing.

Under all the circumstances it is found that Cowan's unsupported threats of lost wages and jobs, the threat to discharge Miller, and the interrogations concerning union activity were a violation of Section 8(a)(1) of the Act.

D. *September 28*

On the following morning, September 28, Miller testified that Cowan again talked to him. Cowan said, "I have been informed that you are one of the ringleaders of this union organizing campaign. Is this true?" Miller affirmed that it was true.

Cowan then said that Miller, Ray Hernandez, and Roland Cortez had also been named as ringleaders of the union movement. Cowan continued that if the Union succeeded, the wages would go to $6 an hour. Everybody would have to start out as an apprentice instead of making in excess of $11 an hour.

During the conversation Cowan told Miller that he was going to call Ray Hernandez in to talk to him also. As Miller was walking away from Cowan's office he saw Hernandez and told him what he had just experienced in talking to Cowan.

Miller is credited as to what Cowan said on this occasion. His demeanor was convincing that his recitation of the conversation was truthful. Cowan's statements on September 28 created the impression of the Respondent's surveillance of employees' union activities. Additionally, it is found that Cowan interrogated Miller about his leadership position in the union movement and threatened that employees' wages would be reduced. I find that all the statements by Cowan are violations of Section 8(a)(1) of the Act. *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 418 (5th Cir. 1981); *NLRB v. Laredo Coca Cola Bottling*, 613 F.2d 1338, 1342 (5th Cir. 1980).

E. *October 12*

Employee Ray Hernandez testified about an encounter he had with Cowan on about October 12. Hernandez had attended a union meeting the night before. The next morning he and Cowan were in the break area before work. About four other employees were present. Cowan asked Hernandez if he attended the union meeting the day before. Hernandez denied that he had. Cowan asked if he knew how many union authorization cards had been signed. Hernandez said he did not know. Cowan stated that he needed to find out how many cards the Union got signed. Cowan denied that he was in town on this date.

Hernandez was credible in relating this conversation. As noted above he still works for the Respondent. It is not certain whether he or Cowan may have been mistaken as to the date. However, because of his demeanor and apparent honest recollection of the encounter I credit Hernandez that it did take place, on or about this date. The interrogation is particularly coercive because Cowan is the highest ranking company official at the base, there was no legitimate basis for the inquiry into the union activities of the employees, and the questioning occurred in the context of many other unfair labor practices set forth in this decision. I find that Cowan's interrogation of Hernandez violated Section 8(a)(1) of the Act.

F. *December 9*

1. Beverly Mack

Employee Beverly Mack recalled that on December 9 she was in building 217. She had gone to see Cowan about sign-

ing some requisitions. He asked her if she supported the Union. She told him she did and that she thought the Union had some good points. He replied by referring to Eastern Airlines and that unions cost companies and employees jobs. Mack told Cowan she could not say bad things about unions as she was married to a third generation union man.

Cowan remembered having a conversation with Mack concerning unions at some unspecified time. He recalled that he did mention Eastern Airlines during this conversation. He denied asking if Mack supported the Union or discussing the adverse impact unions might have on jobs.

Mack gave a credible account of the discussion. Cowan's demeanor was not convincing that he was forthrightly relating what went on during this conversation. I credit Mack's version of events. Cowan's questioning of Mack about her union sympathies is a violation of Section 8(a)(1) of the Act.

I do not find that Cowan's remarks in this instance concerning the negative impact unions could have was an unlawful threat of loss of employment. I find that this part of the conversation is not a violation of Section 8(a)(1) of the Act.

2. Judith Haskin

Employee Judy Haskin testified that Cowan had a conversation with her on December 9. Cowan said that he was aware there were union meetings being held, that she had been attending them and that Haskin favored the Union. Haskin acknowledged she was in favor of the Union. Cowan said that she should be thankful that she had a job and he thought she was very fortunate. Haskin complained about her advancement in the Company. Cowan retorted that with an attitude like hers she would be a long time going anywhere. He told her if she was dissatisfied about her situation maybe she should go to the Labor Board or form a union.

Haskin remembered Cowan saying that she did "a damn good job" at what she did and he could not see why she was complaining. He also told her that Donna Collins (a fellow employee and the wife of Port Operations Manager Terry Collins) had said that Haskin was a good worker.

Finally, Haskin recalled Cowan saying, "January 6." Haskin was puzzled by this remark and asked what he meant. Cowan replied, "That is when I decide whether you stay or go." January 6 was the scheduled date for the representation election.

Cowan did not directly controvert Haskin's version of this conversation other than to deny that he had ever told her to form a union if she was dissatisfied with her lot working for Respondent.

Haskin's demeanor was impressive. She was straightforward in her response to questions and appeared to be relating her recollection with accuracy. Cowan did not substantially controvert Haskin's version of the event. As already noted, Cowan's demeanor throughout his testimony was not convincing. I credit Haskin's version of the conversation. I find that Cowan's reference to the January 6 election was intended as a threat to Haskin's continued employment because of her support for the Union. This threat is a violation of Section 8(a)(1) of the Act.

In addition, I find that Cowan's comments about knowing of Haskin's attending union meetings and favoring the Union created the impression of surveillance. I find these statements also violate Section 8(a)(1) of the Act. *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 601 fn. 6 (5th Cir. 1972).

G. *December 23–24*

Glenna Wilson testified to events that took place on about December 23.[2] She recalled being present in the Public Works Building with employee Dede LaBonte and Cowan. The Respondent was conducting antiunion meetings at the time with the employees and Cowan had just come into her area between meetings. Cowan looked at her and said, "Well, you are not going to vote yes for the union, are you?" Glenna Wilson said she had not yet made up her mind at that point. Dede LaBonte made the same reply. Cowan did not deny Glenna Wilson's testimony concerning this conversation.

Later that afternoon Glenna Wilson was in attendance at one of the Respondent's antiunion meetings along with 20–30 other employees. During the meeting Cowan asserted that union officials received large salaries. Wilson retorted that Respondent's owners, Randall and Martha Ferguson, probably made similar amounts of income.

The next morning, December 24, Cowan asked Glenna Wilson to come into his office. Cowan said that he had to tell the home office about Wilson's comments the day before and they were greatly offended by her disloyalty. He added she had hurt everyone that works for Ferguson-Williams by what she had said.

Cowan did not controvert any of Glenna Wilson's testimony concerning these conversations. I credit Wilson's testimony.

Generally an employer may not rebuke an employee by equating his prounion sympathies to disloyalty to the employer. *House Calls, Inc.*, 304 NLRB 311, 313 (1991). Cowan's remarks about Glenna Wilson's disloyalty and her hurting everyone were coercive and directed at her because of her defense of the Union. I find that these statements are a violation of Section 8(a)(1) of the Act. An additional violation of Section 8(a)(1) of the Act is found concerning Cowan's interrogation of Wilson as to how she was going to vote in the election.

H. *January 6*

During the course of the organizational campaign Cowan created cartoons that were distributed to employees. These cartoons contained identical text that argued against union organization. One sentence which the Government asserts violates Section 8(a)(1) of the Act reads:

> If the Union comes in, it will likely be an irreversible event which will adversely affect your career and your family, possibly for the rest of your work life.

The Board analyzes such statements by weighing the employer's free speech rights under Section 8(c) and the employees' organizational rights under Section 7, as protected by Section 8(a)(1) of the Act:

[2] The Government's brief notes that counsel for the General Counsel misspoke at the hearing as to the date that this allegation in amended complaint par. 7(j) was to have occurred. The record shows that the correct date for this allegation is on or about December 23.

> [T]he analytical question is whether the employer's statement constitutes an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer's control. *Mediplex of Danbury*, 314 NLRB 470, 471 (1994).

A background of other unlawful conduct by the Respondent is significant context for assessing the lawfulness of the Respondent's statements. *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 fn. 4 (1989).

Respondent's commission of other unlawful acts is detailed in this decision. The quoted remarks convey a message of unspecified adverse effects resulting from the employees' selection of the Union as their representative. The record as a whole does not support the statement as correctly reciting economic results beyond the Respondent's control. Additionally, the statement was distributed to employees in an atmosphere of the previously noted unfair labor practices. Considering the totality of the circumstances surrounding the statement, I find that its distribution to employees is a violation of Section 8(a)(1) of the Act.

I. *January 9*

Glenna Wilson testified that on January 9, the Monday following the representation election, Cowan called employee Beverly Mack and herself into his office. Cowan said that the election was over and he was going to have meetings with union and nonunion supporters. He said he knew Wilson and Mack were union supporters and that is why he called them into the office.

On Cowan's desk was a cartoon he had drawn entitled "They came"—"They kicked union butt." (G.C. Exh. 13.) Glenna Wilson testified she had seen Cowan passing out this cartoon to employees earlier that morning. Beverly Mack, however, had not seen the cartoon. Cowan explained how he had drawn this last cartoon and he began explaining a comment on it about "Beverly follies." Beverly Mack was "bewildered" that she was referenced in the drawing and asked, "You did a cartoon about me?" Cowan explained that "everyone" was in the cartoon.

After discussing the cartoon, Cowan explained that the union vote was over with and his wife, Mary, was greatly offended by being called a supervisor and not being able to vote in the election. He said that Mack needed to inform Mary Cowan where she was at all times. He also told Mack, "You are to stay at your desk. Do your work. Don't talk to anyone. Keep your mouth shut. Be low-key and let this union business die." He said that if the two women did this the home office would forget more quickly what they did to the company. Cowan continued that if they were not happy working for the Respondent they were encouraged to find employment elsewhere. Cowan said that if the union business did not die, he would ask for resignations.

Cowan also mentioned Glenna Wilson's recently discharged husband by saying:

> You know, it is just a real shame what the union did to Billy D. [Wilson]. . . . Because of what the union did to Billy D., he will never work for Ferguson-Williams again and he will be damn lucky to get a job in south Texas.

Wilson recalled Cowan also saying, in reference to how she had voted in the representation election, "That any good wife is going to do as her husband pleases . . . and that if he had been for the union, his wife Mary would be also."

Mack also testified about the meeting. She recalled that Cowan told her to stay at her desk, keep her mouth shut, play it low key, stay out of sight, and let the union business die.

Cowan testified that during the course of the union campaign, there had been some problems with Wilson and Mack taking lengthy lunch breaks. He decided to talk to them because the election had been held. He told them, "Let's all get back together; let's get to our desks; and let's get this thing behind us and go back to work." He recalled Mack saying, "So you have decided to take us and separate us from the other people." Cowan testified that he then felt he "had made a major mistake" in talking to the two women, and he concluded the meeting at that point. He did not otherwise controvert Wilson or Mack's testimony of what was said.

The Government asserts that this meeting constitutes unlawful coercion and interrogation. As the statements attributed to Cowan are generally not disputed and because of the demeanor of the three witnesses, I credit Wilson and Mack's versions of what was said.

The conversation contained several unlawfully coercive statements by Cowan. These include: (1) telling the women to "lay low" because of their union activity, (2) the possible forgiveness of the Respondent for their union activity, (3) to seek other work if dissatisfied, (4) asking for resignations if union activity did not abate, and (5) that the Union had harmed Wilson's husband so he would never again work for Respondent and would have difficulty obtaining work. While the complaint did not specifically allege some of these statements as being violations of the Act, they were all fully litigated without objection by the Respondent. *NLRB v. Operating Engineers Local 925*, 460 F.2d 589, 601 fn. 6 (5th Cir. 1972). I find that these statements were unlawful threats and coercion and violated Section 8(a)(1) of the Act.

I disagree with the Government's theory that Cowan unlawfully interrogated Wilson by his statement that a good wife would vote as her husband wished. From all the circumstances I do not conclude that Cowan was trying to elicit a response from Glenna Wilson. Cowan was well aware at that point of the Wilsons' sympathies favoring the Union. I find that the Cowan did not interrogate Glenna Wilson in violation of Section 8(a)(1) by this statement.

J. *January 10*

Employee Judith Haskin testified that on Tuesday, January 10, she was called to a meeting. Present were Sid Cowan, his wife, Mary Cowan (who is the supervisor of the warehouse supply operation), and Safety Manager Wayne Lindsey. According to Haskin's testimony Cowan stated:

> It has been four damn months of this horse shit—union horse shit. My people being harassed. I am tired of it. I am pissed. I am mad as hell. I am not going to tolerate your mess any more, young lady. You were the leader or one of the leaders.
>
> He says, Things are going to change from now on. As far as I am concerned, you haven't done anything

to earn a dime in a long time. You are going to earn every penny you get from now on.

He tells me that, From now on, my vehicle will be inspected—he looked at Wayne Lindsey. He said, You will inspect her vehicle every day. Make a report on her attitude. I will make a file on this young lady.

Then he looks at Mary and tells Mary that she, Will know where I am at all times. During the day while I am out doing my runs, I am to call in and check with Mary Cowan or Donna Collins as to—if there has been any other places that needed to be added to my list.

Then Sid tells me that if I have a complaint again, maybe I should go talk to the Labor Board or go to another union.

Lindsey testified only briefly concerning this meeting. He related his subsequent limited inspection of Haskin's vehicle. Lindsey did not controvert Haskin's version of events as related above. Neither Mary Cowan nor Sid Cowan controverted the quoted conversation with the exception that Sid Cowan denied telling Haskin she should go to the Labor Board with her complaints.

Haskin's substantially uncontroverted testimony is credited. Cowan's quoted remarks demonstrate a severe coercion of Haskin based on her union activities. I find that Cowan's statements created the impression of surveillance of employees' union activities. Additionally, the statements were coercive and a threat of reprisals against Haskin for her union sympathies. These statements are found to be violations of Section 8(a)(1) of the Act.

The closer supervision of Haskin's work because of her protected activities was not alleged as a violation. However, the matter was fully litigated without objection. *NLRB v. Operating Engineers Local 925*, supra at 601 fn. 6. I find that the closer scrutiny of Haskin's work performance is a violation of Section 8(a)(1) and (3) of the Act. *International Carolina Glass Corp.*, 319 NLRB 171 (1995); *Carillon House Nursing Home*, 268 NLRB 589 fn. 3, 593–594 (1984).

III. DISCHARGE OF BILLY D. WILSON

Dockmaster Billy D. Wilson was discharged on December 13. The Government alleges the termination was motivated by his union activities. The Respondent contends that Wilson was legitimately discharged for using abusive language towards a fellow employee. In the alternative the Respondent asserts he was a supervisor not subject to protection under the Act.

A. *Wilson's Supervisory Status*

Wilson worked as a dockmaster under the supervision of Port Operations Manager Terry Collins. Wilson and Collins worked overlapping shifts of 12 hours, 7 days a week. The record as a whole establishes that Wilson's duties mainly involved the proper docking of Navy ships upon their arrival at the base. When he first started working for the Respondent in August 1993, Wilson was hourly paid. However, because he worked large amounts of overtime, he was shifted to salaried status in about October 1993. Wilson received no benefits as a salaried employee. He shared offices with approximately 13 other employees. Wilson wore a white shirt which he testified he had been told to wear for greater visibility so the ships could distinguish him when he was standing on the dock.

Wilson would receive his assignments from a dispatch tower that communicated with the Navy and Respondent's personnel about the ships' movements. When a ship docked the vessel had to be connected to shore electrical power, plumbing, telephones, and utilities. Wilson's job was to see that the berth was set up and ready to receive any type of Naval vessel. He would stand on top of a double-decked pier to see the ship dock. Wilson could answer questions via radio for a ship's captain about things he could not see from the vessel. Wilson would give the ship advice or investigate the matter from the land side. Wilson's analogy for the docking operation was that his work was similar to a parking lot attendant.

Once a ship is docked the mooring lines are tied off by U.S. Navy personnel. The plumbers, the electricians, and other working parties are on the pier level below where Wilson stood. After docking Wilson would go down to the utility pier and assist anyone who may need help.

Once the ship is tied up and all the utilities are connected, the captain releases the Respondent's employees and they return to their other duties. Wilson has no working contact with these persons after this point. Electrician Fred Null testified that Wilson never supervised his work. The ship berthing and departure process requires Wilson to be present 30 minutes prior to a departure and an hour prior to an arrival. He estimated the process then takes about an hour to complete.

Wilson does not assign berths to ships. He does do a daily inspection of the pier and filled out a report on his findings. If he sees a sheen on the water he reports his finding to the dispatch tower which would notify the appropriate personnel about the matter. On one occasion he coordinated the port facilities when a ship ran aground and assisted in attempting to get the ship afloat.

Wilson has never promoted, hired, fired, laid off, or granted time off to an employee. He attended one salaried employees' meeting in mid-October of 1994. On one occasion he was instructed by Collins to write up a disciplinary report on employee Todd Houston. He complained he did not know anything about the matter but was still required to write the report. On one occasion Wilson was asked to sit in on a job interview conducted by Cowan. The applicant was being considered for a dockmaster position and Collins was not available to assist Cowan.

Wilson, early in his employment with Respondent, signed timecards for some employees. This practice ceased shortly after Respondent took over. Employee Jeri Mitchell gave uncontroverted testimony that she was told by Collins that Wilson was not to sign the cards anymore as he was not a supervisor. Wilson testified without contradiction that if serious questions arose at work he would telephone Collins at his residence to get instructions. Collins acknowledge that he kept in close contact with the port at all times and had taken only two vacations in the last 3-year period.

As noted above, at an October 19 salaried employees' meeting, management officials announced Wilson and Quality Control Inspector Joe Miller were "white shirts" or salaried employees. They also stated these men were going to be considered supervisors. Former Manager Henri Fuentes gave uncontroverted testimony that these men had not been con-

sidered supervisors prior to this meeting. Although supervisory meetings were referred to on the record, there is no evidence that Wilson ever attended such meetings.

B. *Analysis of Wilson's Work Duties*

Section 2(11) of the Act defines a supervisor as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Supreme Court has noted that Congress differentiated between supervisors who were empowered with "genuine management prerogatives," and "straw bosses, lead men, and set-up men" who are protected by the Act "even though they perform "minor supervisory duties." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280–281 (1974). See also *NLRB v. Dickerson-Chapman, Inc.*, 964 F.2d 493, 497 (5th Cir. 1992) ("An employee's specific job title and station in the organization are not automatically controlling. The employee's *actual* authority and responsibility determine whether he is a supervisor." Emphasis in original.); *NLRB v. Security Guard Service*, 384 F.2d 143 (5th Cir. 1967); *Mack's Supermarkets*, 288 NLRB 1082, 1084 (1988).

In sum, the record shows that Wilson did not have a crew working under him. The others involved in the docking operations worked independently. Wilson, as well as the other personnel, all received their assignments from the dispatchers in the tower.

The burden of proof is on the party asserting supervisory status. *Health Care Corp.*, 306 NLRB 63 fn. 1 (1992). The Respondent did not offer substantial evidence to sustain this burden. Rather it relied mainly upon self-serving leading questions to elicit testimony that Wilson "had the authority" to perform virtually all of the listed functions of a supervisor. Testimony of this nature runs the risk of being given little evidentiary weight. Responses to leading questions are devalued because they suffer the weakness of being the testimony of the questioner rather than the witness. *H. C. Thomson, Inc.*, 230 NLRB 808, 809 fn. 2 (1977). Such evidence must be weighed against substantive nonleading testimony. This evaluation of the evidence is consistent with the concern expressed by the Fifth Circuit that it is the actual duties of the worker that count when determining supervisory status. *NLRB v. Dickerson-Chapman*, supra.

Wilson's detailed testimony of his day-to-day work shows that he did not "responsibly direct" any of Respondent's employees or perform other duties that meet the Act's supervisory criteria. *NLRB v. KDFW-TV, Inc.*, 790 F.2d 1273 (5th Cir. 1986). I credit Wilson's precise testimony of his duties and authority over the generalized claims asserted by the Respondent's witnesses. I also credit the testimony of Fuentes and Mitchell that Wilson was not considered a supervisor by Respondent's management.

Based on the record as a whole, the Respondent has failed to meet its burden of proving that Billy D. Wilson was a supervisor within the meaning of Section 2(11) of the Act. Rather, I conclude Wilson was an employee within the meaning of Section 2(3) of the Act. *NLRB v. KDFW-TV, Inc.*, supra.

C. *Wilson's Union Activity*

Wilson was a supporter of the Union's organizational campaign. He attended union meetings starting with the first one in late September. He signed a union authorization card at the first meeting. Wilson later had his wife also sign a card.

Respondent had knowledge of Wilson's union sympathies. In uncontroverted testimony, Wilson described a meeting he had with Henri Fuentes in mid-October where Wilson was trying to get a pay raise. During the conversation Fuentes asked Wilson if he had attended any union meetings. Wilson acknowledged that he had and that he was in support of the Union. In another incident, Collins, on an unspecified date, warned Wilson that he should not be involved with the Union. Wilson told him it was none of his business what he did.

D. *Wilson's Argument with Houston*

On December 8 Wilson and fellow employee, Todd Houston had a confrontation about whether Houston would work overtime to fill in for an absent employee. During this verbal dispute Wilson used vulgar profanity towards Houston. This included remarks about Houston's sexual desires for his fiancee in preference to working overtime. Houston was angry about Wilson's words and, on December 9, complained to Port Operations Manager Terry Collins.

Houston and Collins had varying recollections of what happened after the complaint was made. Houston recalled that after complaining about Wilson's remarks, he went to work. Shortly, Collins approached him in the boat bay area with a pad of paper and told Houston to tell his boat captain that he was going to be busy for a while. He then instructed Houston to write up a grievance about what Wilson had said. Collins denied that he sought out Houston to write up the grievance. He claimed Houston voluntarily brought him the written grievance. I credit Houston's version of who instigated having the grievance reduced to writing. This conclusion is based on the demeanor of the two witnesses, the fact that Houston was still employed by the Respondent and by weighing the motivation each might have for not accurately testifying to what happened.

E. *Respondent's Decision to Discharge Wilson*

On December 12 Collins notified Cowan of the grievance and gave him Houston's written account of the confrontation. Wilson was then summoned to discuss the matter with Cowan and Collins. Cowan told Wilson he was being written up for sexual harassment and cussing an employee. After reading Houston's statement, Wilson admitted the argument and confirmed the gist of what was set forth in Houston's statement. Cowan told Wilson he could be discharged, suspended or required to apologize because of the incident. He asked Wilson if he had a problem apologizing to Houston. Wilson said he did not. Cowan told him that he would discuss the matter with Houston and see what he wanted to do to make him whole. Wilson was then released to return to work. Cowan informed the Huntsville home office of the

matter. Cowan also discussed with Houston what he wanted to do about the matter and gave him time to think it over.

At about 3 p.m. the same day Houston was again called into Cowan's office. Cowan asked if he had thought about the matter. Houston said he had and he did not want Wilson to be fired. Cowan told him that it was out of his hands, that the home office had ordered Wilson fired. Shortly thereafter Wilson was called to the office and terminated for "sexual harassment" and using profanity towards an employee. By letter dated December 20, Cowan gave a letter of recommendation concerning Wilson's service to the Respondent. The letter concluded with Cowan's recommendation to the home office that Wilson be rehired after a 60–90-day suspension. Wilson was never rehired.

On December 15, Cowan distributed a letter to Respondent's employees on the subject of Wilson's discharge. The letter states that Wilson was fired because:

> His conduct towards a subordinate employee was totally inappropriate, harassing and personally abusive. Ferguson-Williams cannot allow its supervisors to be abusive. [G.C. Exh. 17.]

As noted above, on January 9, Glenna Wilson had a conversation with Cowan. According to Glenna Wilson's uncontroverted testimony Cowan said that it was "a real shame what the union did to Billy D. . . . . Because of what the union did to Billy D., he will never work for Ferguson-Williams again and he will be damn lucky to get a job in south Texas."

F. *Analysis of Wilson's Termination*

1. Standard of proof

The Respondent, while conceding that Wilson was a very good employee, argues that his discharge was required by his vulgar language directed at Houston. The Government asserts that this incident was a pretext, seized upon to discharge Wilson because of his union activities.

The General Counsel has the initial burden of establishing a prima facie case. This must be sufficient to support an inference that union or other protected activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support a prima facie showing of discriminatory motivation under Section 8(a)(3) are union activity, employer knowledge, timing, and employer animus. Once such prima facie unlawful motivation is shown, the burden shifts to Respondent to demonstrate that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *NLRB v. Mini-Togs, Inc.*, 980 F.2d 1027, 1032–1033 (5th Cir. 1993).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). See also *T & J Trucking Co.*, 316 NLRB 771, 771–772 (1995); *Garney Morris, Inc.*, 313 NLRB 101, 102 (1993).

2. Conclusions as to Wilson's discharge

There is abundant evidence that the Respondent had animus towards the Union. Respondent's numerous violations of Section 8(a)(1) of the Act are evidence of that fact. The timing of Wilson's discharge was concurrent with his misconduct. The timing was also contemporaneous with the middle of the Union's organizational campaign and during a period Wilson was engaging in union activity.

The evidence shows that the Respondent had knowledge of Wilson's union activities. Wilson was confronted by Supervisors Fuentes and Collins about his union support. Cowan told Wilson's wife it was "too bad" what the Union had done to her husband. Fuentes testified that certain employees were keeping Respondent's management informed about the employees' union activities during the campaign. Cowan was actively interrogating employees about the workers' union activities. Cowan was openly speculating as to who was involved with the Union. Cowan admitted, "We were all trying to find out what was going on." The record supports the conclusion that the Respondent had knowledge of Wilson's union activities. *Marathon LeTourneau Co. v. NLRB*, 699 F.2d 248, 253 (5th Cir. 1983).

Examining the alleged reason for the discharge, it is manifest that Wilson's comments to Houston were vulgar and not to be condoned. Some even-handed discipline for such conduct would not be extraordinary. However, that is not the situation presented here. The well-worn phrase "swearing like a sailor" was given credence in this case. The record is replete with examples of employees and management officials making vulgar, insulting, and confrontational comments without penalty. The conclusion reached from comparing these examples with Wilson's situation is that he was treated uniquely. None of Respondent's employees, other than Wilson, has ever been discharged for such conduct. Some examples show:

1. Employee Dawn Spiegelhoff was cursed at by Supervisor Terry Collins. She complained to Cowan about the incident. Cowan told her Collins was not at fault because he was under stress. Collins neither apologized for the incident nor was he ever disciplined over the matter.

2. Employee Jeri Mitchell cited an incident where Collins cursed severely in front of her and a navy officer. After the officer, who was an African-American, left the office, Collins made a vicious racial slur about him. No discipline or apology was offered because of this occurrence.

3. Mitchell testified to another incident that involved Collins and occurred the same day as the Wilson-Houston argument. Collins cursed in front of her and some navy officers about contractors working at the base. Mitchell was embarrassed by the incident and wrote a grievance to Cowan. A few days later, just shortly after she learned Wilson had been fired, Collins came to her and apologized about his conduct. Collins was not disciplined for his conduct.

4. Another contrasting example of discipline was an incident involving Todd Houston. He became angry at his boat captain and physically threatened him. The captain was

frightened by the incident. Houston was not discharged but was suspended for 2 days.

In Wilson's case, the complaining employee, Houston, made it clear to the Respondent that he did not want Wilson fired. Wilson's immediate supervisor, Terry Collins, recommended against discharge. Project Manager Cowan did not want him discharged, suggesting instead a 60–90-day suspension. The home office, however, allegedly found Wilson's vulgar cussing was so peerless it required his termination. Home Office Representative Don Strawn testified that it was a "gut-wrenching" decision. Randall Ferguson, who had the final say in the discharge decision, did not testify.

Some insight into Respondent's motivation in discharging Wilson was presented by Cowan's remarks to Glenna Wilson. The uncontroverted record shows Cowan told her that, "[y]ou know, it is just a real shame what the union did to Billy D. . . . . Because of what the union did to Billy D., he will never work for Ferguson-Williams again and he will be damn lucky to get a job in south Texas." Significantly Cowan did not mention profanity being the reason Wilson was fired. The implied reason for the discharge was "what the union did" to Wilson.

The record as a whole sustains the conclusion that Wilson was treated disparately when he was discharged. The Respondent's tolerant acceptance of profane and abusive language is well established by the evidence. I find that Wilson's profanity was used as a pretext for his termination. *NLRB v. Delta Gas*, 840 F.2d 309, 313 (5th Cir. 1988); *Meco Corp.*, 304 NLRB 331 (1991); *Tra-Mar Communications*, 265 NLRB 664, 666–668 (1982). Because of the false reason stated for the termination, an inference is made that there was another motive which the Respondent wished to conceal. The evidence shows that reason was Wilson's support for the Union. *Shattuck Denn Mining v. NLRB*, 362 F.2d 466 (9th Cir. 1966). The discharge of Billy D. Wilson is found to be a violation of Section 8(a)(1) and (3) of the Act.

IV. DISCHARGE OF JOSEPH MILLER

Joseph Miller worked for Respondent approximately 3 years as a quality control inspector. He was terminated on February 2 for "business reasons."[3] The Government contends that Miller was a known union supporter and that his discharge resulted from this protected activity.

A. *Miller's Union Activity*

Miller supported the Union's campaign from its inception in September. He attended meetings, signed a union authorization card, was a member of the Union's organizing committee, and wore a button stating that fact.

The Respondent was aware of Miller's union sympathies. As noted above, on September 27 and 28, Cowan unlawfully threatened Miller with discharge because of his union activities and interrogated him about his union sympathies. This included confronting Miller by stating that the Respondent had been informed he was one of the union leaders. Additionally, Respondent's own records confirm that Miller "had become a leader in the I.B.E.W. Union Activities." (G.C. Exh. 22.) The Respondent's postelection "kicked union butt" cartoon also makes reference to Miller with the words, "Miller tears." (G.C. Exh. 13.)

B. *Cowan Directs that Reasons be Found to Discharge Miller*

Former Deputy Project Manager Henri Fuentes testified that on several occasions he discussed Miller's union activities with Cowan. In late September or early October Cowan instructed Fuentes to check on every inspection that Miller performed. Cowan was aware of reports that not every job was necessarily checked. Cowan said to give Miller's work this scrutiny, "To find reasons to terminate him." Cowan denied he had ever made such a statement. Considering the demeanor of these two witnesses I credit Fuentes who impressed me as a truthful person. Cowan, as previously noted, did not present a persuasive demeanor.

C. *Miller is Placed on Probation*

On November 2 Miller was called to a meeting with Cowan and Home Office Managers Mike Ferguson and Don Strawn. Cowan said that he had bad reports about Miller and that there were five service calls that he had not physically inspected. Miller said that was possible and inquired which calls Cowan was talking about. Cowan did not answer. Miller was not shown any of the reports allegedly made against him or told who had made them.

Miller had never received any written warnings about his work performance. He had never been placed on probation before. Miller recalled Cowan saying that he had been doing a good job. Strawn and Cowan testified that statement was not made.

Miller was told Respondent was putting him on 60 days' probation. Strawn stated that Cowan had come forward on his behalf and thought that he was definitely salvageable and wanted to work with him.

On November 7 Miller wrote up a request on a suggestion box form and took it to Cowan. (G.C. Exh. 40.) On this form Miller requested that Cowan give him written specifics of any bad reports about his work. A few days after hand delivering the form Miller asked Cowan about his request. Cowan told him that if he got the bad reports in writing that he would have to terminate Miller's "ass."

D. *Miller's Bonus*

In late December Miller received a $300 bonus check from the Respondent. Miller was called into Cowan's office where Strawn was waiting alone for him. Strawn thanked him for the job that he had done for Respondent and said he wished it could be more.

Miller then walked out the door of the office and Cowan was standing outside. Cowan told him not to say anything to anyone about the bonus because he was the only one that got one. Miller said that was no problem. Miller then recalled Cowan saying, "Well, you work good for me, man. . . . I got to see what I can do about getting you a raise."

[3] The Government notes the Respondent's case hinted at the proposition Miller was a supervisor or manager. The Respondent's answer does not assert this argument as an affirmative defense. Neither the Respondent's opening statement nor brief argue this defense. The record does not prove the point. I find there is insufficient evidence to conclude that Miller was either a supervisor or manager.

E. *Respondent's Written Appraisal of Miller's Work*

Respondent submits periodic reports to the Navy which are self-assessments of its work at the base. Part of the work evaluated by the Respondent was Miller's quality control duties. The reports characterize that quality control work as follows:

> The quality of work in conjunction with our Quality Control Program was *excellent* based upon the following:
>
> . . . .
>
> b. 99% inspections by QC on service calls and delivery orders. F-Ws Contractor Quality Control Program remains excellent due to dedication of QC Inspector and effectiveness in ensuring work is accomplished within work requirements and is acceptable prior to sign-off. [G. C. Exh. 44.]

F. *Events Subsequent to Miller's Probationary Period*

On January 2 Miller's 60-day probationary period ended. Miller was given no indication that he had not successfully completed the probationary period. On January 6 the representation election was held.

On January 8, the Sunday following the election, Miller called Cowan at his home. Miller congratulated him on the Respondent's election victory. He told Cowan, "Now that you have won the anti-union campaign, well, I guess the least you could do is give me off tomorrow." Cowan replied that he would give him more than the next day off. Cowan stated, "You better take a couple of extra days. . . . You pissed off a lot of people here. You pissed off the union people and you pissed off the non-union people. You better take a couple of extra days. And he says, Lay low."

On January 26, Robert Coleman, the grounds maintenance subcontractor for Respondent at the naval station, Ingleside, wrote a letter to Cowan complaining about a possible conflict of interest involving Miller. (R. Exh. 10.) On a couple of occasions before January, Miller had borrowed a small tractor from Coleman. After some thought, Coleman decided this might present a conflict of interest situation as Miller inspected the landscaper's work. He never told Miller about his concern.

G. *Miller's Discharge*

After he received Coleman's letter Cowan turned it over to Don Strawn. Cowan testified, "I was informed by Don that the decision was made, *because Joe was on probation at that time*, that a business decision would be made to terminate him."

On February 2 Cowan called Miller to the conference room where John Falkenberry, the Respondent's attorney, was also present. Cowan told Miller they had made a "business decision" to terminate him. Miller was told if he would resign and sign a letter holding the Respondent harmless from any liability, they would not contest his filing for unemployment. He was also told the Respondent would give him a letter of recommendation with a month's severance pay. Miller refused the offer to resign. Cowan and Falkenberry told him to take the weekend to think about the offer. Miller never accepted the offer to resign and was terminated.

Respondent asserts the business reasons for discharging Miller were checking some work by telephone, tardiness, putting his feet on his desk, reading the newspaper at work, body odor, and the conflict of interest situation with Coleman landscaping.

H. *Analysis of Miller's Discharge*

Joe Miller's work was critiqued by several witnesses presented by both parties. Some thought his work was good, some testified he was slack in performing his duties. On balance, however, the Respondent's assertion that Miller had been a poor employee for a sustained period does not harmonize with the evidence.

One reason casting doubt on the Respondent's defense is presented by its own records. The written assessments sent by the Respondent to the Navy consistently state that the quality control work was "excellent." Another consideration is the lack of warnings that Miller's work was unacceptable—at least until the union campaign commenced.

Consideration must also be given to Respondent's curious reaction to Miller's requests for specifics about complaints on his work. In his probation notification meeting Miller asked for details. He later repeated the request in writing. Cowan ignored both of these entreaties and never did supply any specifics.

Also significant is the vacillating attitude Respondent took towards Miller's work. Thus, Miller was on probation during December. At this same time Respondent awarded him a bonus. Both Strawn and Cowan sweetened the bonus with words of praise for his work.

Important insight into how the Respondent viewed Miller comes from Fuentes' testimony. Cowan commanded him to find an excuse to discharge Miller. That order is substantial evidence of motivation for Miller's termination. This instruction was contemporaneous with Cowan's interrogation and direct threats to Miller that he would "fire his ass" if he had anything to do with the Union. *NLRB v. Brookwood Furniture*, 701 F.2d 452, 457, 460 (5th Cir. 1983).

Further evidence of the weakness of Respondent's defense is demonstrated by Cowan's testimony that because Miller was still in his probationary period he was to be fired on February 2. This testimony misstates the facts. Miller's 60-day probationary period had ended a month earlier. Similarly, the conflict-of-interest reason for the termination is questionable. No investigation of Miller's side of the story was ever conducted. Miller was never told by Coleman or the Respondent that his borrowing of the loader was a problem. Additionally, Miller was never told the alleged conflict of interest was a part of the reason for his discharge.

In sum, the evidence sustains the Government's prima facie case that Miller was discharged because of his union activity. The Respondent's evidence does not rebut the prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I find that the Respondent's discharge of Joseph Miller violated Section 8(a)(1) and (3) of the Act. *NLRB v. Brookwood Furniture*, supra at 468–469.

V. THE LAYOFF OF JUDITH HASKIN

Judith Haskin started work for the Respondent in August 1993. She was laid off on June 2, 1995. At the time of her lay off she was working as a shuttle busdriver. The Respondent argues that she was terminated because the Navy discontinued contracting for bus service. Respondent asserts that while Haskin is eligible for rehire, she has not been recalled because there have been no job vacancies for which she is qualified. The Government asserts that Haskin was terminated and not recalled because of her union activities and because she filed charges under the Act.

A. *Haskin's Work History*

During the 2 years Haskin worked for the Respondent she held several different jobs. She worked as a shuttle busdriver, light truckdriver, parts runner, clerk in the warehouse, grounds maintenance, and janitorial.

The Respondent introduced evidence that supported its position that Haskin was not successful at any job except shuttle bus driving. She was alleged to be slow, unavailable when needed, and sloppy in policing her truck for trash. The Government countered with evidence that Haskin's work was acceptable.

The Respondent did employ Haskin for 2 years. During this time she did not receive any written discipline nor was she suspended for any reason. She received periodic raises in wages. This included getting an increase in pay when she went from her position as a parts runner to her final job as a combination shuttle busdriver, vehicle washer, and light driver.

B. *Haskin's Union Activities*

Haskin was active in the Union's organizational campaign. She attended union meetings, signed a union authorization card, and had approximately five other employees sign cards. Additionally, she wore a bright pink hat which bore the word "Union" written in glitter. Haskin purchased her own safety belt and likewise decorated it with glitter bearing the word "Union." She wore a "Union Yes" pin on her jacket. Haskin placed a union bumper sticker on her car. At two company meetings she was referred to by management as being someone knowledgeable about the Union.

C. *Supervision's Confrontations With Haskin*

1. October 1

On October 1, Haskin complained to Cowan about raises other employees had gotten and she had not received one. Cowan told Haskin that he had nothing to do with it that it was the Labor Board that had made the determination. Cowan added that if she had a complaint about the matter that she should go to the Labor Board or form a union.

2. November 2

In a memo dated November 2, Cowan recommended the discharge of Haskin. In this document Cowan relates that he has been dissatisfied with Haskin's work and he had a talk with her. The memo reads in part:

> Since that period of time, and the fact that she was told the Union was coming in, her performance and co-operation deteriorated rapidly. I contacted the Home Office informing them of my intent to discharge her based on her poor performance and harassment of other employees (related to Union activities). The Home Office informed me that due to the proposed Union petition that I should defer disciplinary action if at all possible until an election was held. [G.C. Exh. 52.]

There is no evidence that Haskin was ever disciplined for unacceptably harassing fellow employees about the Union.

3. December 9

December 9 was the date of the previously discussed conversation between Haskin and Cowan. In that conversation he said January 6 (the day of the election) was the day he decided whether Haskin would, "Stay or go." As noted above, this conversation is found to be a violation of Section 8(a)(1) of the Act.

4. January 9

It was well known that Haskin frequently dressed in her favorite color—pink. As previously noted, on January 9, Cowan distributed to employees the cartoon celebrating the Respondent's victory in the representation election. This cartoon made reference to Haskin with the words, "Thank the pink lady."

5. January 10

As set forth above, on January 10 Cowan engaged in coercive conduct when he accosted Haskin about her union activities. Cowan vehemently expressed his anger at her. He accused her of being a union leader and told her she was to be closely supervised. Cowan expressed his deep displeasure with the past 4 months of her union "horse shit."

D. *Haskin's Transfer to the Shuttle Bus Job*

The Respondent knew there was a possibility that the shuttle bus service it provided to the Navy was to be eliminated. Cowan testified that this was something he was aware of throughout the term of Respondent's contract with the Navy. In March Haskin was given a pay raise and transferred to driving the shuttle bus.

E. *Charges Filed*

On March 20, the Union filed the unfair labor practice charges in Case 16–CA–17262. Several employees are named in the charge. Part of this charge refers to interrogation of Haskin and a threat to discharge her because of her union activities.

F. *Haskin's Termination*

On June 2, Haskin was told the reason for her layoff was the Navy's cancellation of her bus route. Haskin testified that Cowan told her, "the company was going to lose funds and they couldn't really afford to keep me on." Jimmy Gallagher was also laid off at the same time. No evidence was presented of the specific economic effect the contract cancellation had on the Respondent's operations.

Haskin was told that the Respondent would call her when another job opening occurred. Additional employees were

hired by the Respondent at Ingleside after Haskin's layoff. Haskin was never called by Respondent to fill any subsequent job vacancies.

G. *Analysis of Haskin's Discharge*

Haskin's union activities were well known to the Respondent. The November 2 memo demonstrates Cowan's anxiety that Haskin was engaging in union activity. The conversations cited above show the animus that Cowan had for Haskin because of her union activities. The timing of the vituperative January 10 conversation, which happened after the election, shows in particular a continuing concern about Haskin's union sympathies.

Respondent's defense that Haskin was a bad worker at all jobs but bus driving is not credited. First, there is the background of Cowan's threatening and coercive statements concerning Haskin. Second, Haskin was never formally reprimanded or suspended for her work. Third, Respondent's action in giving Haskin a pay raise and the new job of bus driving belies a concern for her job performance. The pay raise followed the heightened scrutiny of Haskin's work which Cowan directed on January 10. Fourth, Cowan concedes she was a good driver. Thus, she was eligible for rehire in that position. I conclude that the Respondent has not established that Haskin was the bad worker it has asserted. I find that Haskin was capable of performing a variety of work as demonstrated by the jobs performed while working for Respondent.

The evidence shows that the Respondent anticipated the bus job would provide a convenient excuse to eliminate Haskin from its work force. Cowan was acutely aware that the shuttle service could be abolished at any time. In sum, I find that Haskin's change in job assignment to busdriver was discriminatorily designed to eliminate her from Respondent's work force. I further find that Haskin's alleged malfeasance in jobs other than the shuttle driver position was a pretext by the Respondent to avoid recalling her from lay off.

In sum, I find that the Government has sustained its burden of showing that Respondent orchestrated the awarding of the bus job to Haskin in order to rid itself of a highly visible union supporter. I find that the layoff of Judith Haskin violates Section 8(a)(1) and (3) of the Act. As her termination was unlawful and requires an immediate reinstatement remedy, I find it unnecessary to rule upon whether Haskin would have been eligible for recall to any job openings occurring subsequent to her termination.

The Government has also alleged that Haskin's termination and lack of recall violate Section 8(a)(4) of the Act. This allegation is based on the March 20 and June 29 unfair labor practice charges that named Haskin. The evidence does not sustain this allegation. Other employees were named in the charges. When the March 20 charge was filed Haskin had already been transferred to the job that was intended to be the end of her career with Respondent. There is no independent showing that the motivation for Haskin's termination was the filing of the charges. I find that the Government has failed to prove by the preponderance of the evidence that the Respondent violated Section 8(a)(4) of the Act when it discriminatorily laid off Judith Haskin and subsequently refused to recall her.

CONCLUSIONS OF LAW

1. Ferguson-Williams, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Brotherhood of Electrical Workers, Local 278, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Coercing and threatening employees, because of their union activities, with termination, reduced wages, and unspecified adverse effects on their employment.

(b) Coercing employees about their union activities by telling them they were disloyal, should refrain from union activity, hope Respondent would forgive them, and should seek other employment.

(c) Interrogating employees about their union activities and sympathies.

(d) Creating the impression of surveillance of employees' union activities.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging Billy D. Wilson, Joseph Miller, and Judith Haskin because of their union activities and by engaging in closer supervision of Judith Haskin's work.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not violated the Act except as herein specified.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights guaranteed under Section 7 of the Act.

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Billy D. Wilson, Joseph Miller, and Judith Haskin it must offer them reinstatement to their former positions, without prejudice to their seniority or other rights and privileges, or if any such positions do not exist, to substantially equivalent positions, dismissing if necessary any employee hired to fill the positions, and to make them whole for any loss of earnings and other benefits they may have suffered, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent shall expunge from its records all references to the unlawful terminations of Billy D. Wilson, Joseph Miller, and Judith Haskin and the closer supervision of Judith Haskin and notify them in writing that this has been done, and that Respondent will not rely upon their terminations or closer supervision as a basis for future discipline of them.

[Recommended Order omitted from publication.]